IN THE CIRCUIT COURT OF WAYNE COUNTY
STATE OF MISSISSIPPI

JERRY WAYNE ATWOOD — PETITIONER

VS. — CAUSE NUMBER CV.2014-130-B

STATE OF MISSISSIPPI — RESPONDENT

STATE'S RESPONSE TO MOTION FOR POST-CONVICTION RELIEF

COMES NOW the State of Mississippi, by and through the District Attorney for the Tenth Circuit Court District, and responds, as ordered by the Circuit Court, to the Motion for Post-conviction Relief filed by the Petitioner's "volunteer counsel" as follows:

I. RESPONSE TO INTRODUCTION/FACTUAL AND PROCEDURAL HISTORY

The State offers no particular objection to the Petitioner's recitation of facts, to the extent they may be relevant, as set forth in his introductory remarks in the first six pages of his Motion; however, the State does take issue with any legal arguments/conclusions contained therein, as will be shown hereinafter.

II. ATWOOD'S REVOCATION IS NOT AN ILLEGAL SENTENCE.

The Petitioner's argument begins with the suggestion that "Mr. Atwood's Sentence is Illegal Because It Exceeds the Statutory Maximum for a Technical Violation of Post-Release Supervision." What such an argument ignores, though, is that the revocation of the suspension of the execution of part of the Petitioner's sentence is not a sentence at all. Rather, it is an order for the enforcement of the Petitioner's sentence of ten years to serve with all but one month suspended, said sentence having been ordered on January 15, 2014. (A copy thereof is attached to the Petitioner's original motion and omitted here for the sake of not cluttering the record further with needless copies.) The distinction between a sentence and a revocation is significant and apparently

lost on the Petitioner. The sentence in Cause Number 12-132-K, Mr. Atwood's criminal case, was for the crime of grand larceny. At the time such sentence was entered, the penalty range for said crime, as established by the Mississippi Legislature, was a maximum of ten years imprisonment and/or a fine of $10,000.00. Section 97-17-41, Mississippi Code of 1972 Annotated, as amended prior to 2014. Thus ***the sentence*** in said cause was clearly within the statutory limits in effect at the time of sentencing for the crime of grand larceny. The 2014 amendments to Section 47-7-37, Mississippi Code of 1972 Annotated, then, were amendments not of sentencing laws but of procedural aspects of revocations of suspensions of sentences, an area reserved exclusively to the rule-making authority of the courts by our state's Constitution.

III. HOUSE BILL 585 INVADES THE PROVINCE OF THE COURT

The sentence never changed. Any proceedings thereafter dealt with enforcement of the original sentence, not with the sentence itself. Enforcement of the sentence is purely a judicial function, not a legislative one. Once a defendant has been sentenced according to the guidelines established by the legislature, the defendant is subject only to the power of the courts to deal with the carrying out of such sentence. See *Thomas v. Warden,* 999 So.2d 842 (Miss. 2008), wherein the Mississippi Supreme Court held, at page 847, that legislative "authority to make law gives way to this Court's rule-making authority when the suit is filed, not before." Obviously, analogous to that civil concept would be that once an indictment is returned by a grand jury and filed of record, the matter becomes one for judicial determination rather than legislative enactment. To suggest, as the Petitioner does, that legislative encroachment upon the judicial function after a judgment has been entered by a court of law is appropriate is to claim that the inherent power of the court to enforce its own orders does not even exist.

While this writer could find no Mississippi case directly on point as to the legislature's attempting to limit such inherent power of the court, it is submitted that the existence of such power is so ingrained in the very fabric of the constitutional doctrine of separation of powers that no one has ever even dared to seriously challenge it.

Perhaps the concept is best summarized by the Supreme Court of Mississippi in the case of *Magyar v. State*, 18 So.3d 807 (Miss. 2009), wherein it held at pages 810-811 as follows:

> ....A basic tenet of American government is judicial independence, and every state has a judicial branch of government separate from its legislative branch. We hold firm to the principle that Mississippi's legislative branch of government may not, through procedural Legislation, control the function of the judiciary. *See* Miss. Const. art.1, section 1 ("The powers of government of the State of Mississippi shall be divided into three distinct departments, and each of them confided to a separate magistracy, to-wit: those which are legislative to one, those which are judicial to another, and those which are executive to another."); Miss. Const. art.1, section 2 ("No person or collection of persons, being one or belonging to one of these departments, shall exercise any power properly belonging to either of the others."); Miss. Const. art. 6, section 144 ("The judicial power of the State shall be vested in a Supreme Court and such other courts as are provided for in this Constitution.") Stated another way, this Court cannot – consistent with the Mississippi Constitution – relinquish to the Legislature the duties and powers constitutionally imposed upon the Supreme Court.
>
> Indeed, ***our subservience to legislation that mandates what our trial judges must say*** to a defendant in a courtroom during a plea hearing ***would be tantamount to both an abdication of our judicial duty, as well as tacit approval of legislative usurpation of the judicial prerogative***.... (Emphasis added)

While the quoted passage comes from a case deciding an issue of whether or not courts are required to advise defendants in sex cases that they would be subject to certain registration requirements according to some statute, the constitutional principle is the same: the legislature lacks authority to dictate court functions, and those functions are subject only to the rule-making power of the courts.

Significantly, later in *Magyar*, at page 812, the court noted that "(w)e hold today that judicial rules – such as rules of evidence, civil procedure, criminal procedure, and professional conduct – neither come from the Legislature nor require legislative approval."

The adoption of House Bill 585 was patently an attempt by the legislature to override the authority of the court to enforce a valid sentencing order that had been entered prior to the adoption of said act. (That is not to concede, or even suggest, that the timing of the enactment of said bill makes any difference. It would always be an encroachment by the legislature to the extent that it purports to limit a judge's power to enforce his court's order.)

On page 8 of his motion, Petitioner posits that "the Legislature made a well-reasoned policy decision to alter the statutorily-authorized sentences for violations of post-release supervision." That argument, however, leaks water and is, in fact, "legally irrelevant" as held by our Supreme Court in *Alexander v. State By and Through Allain*, 441 So.2d 1329 (Miss. 1983), at page 1339, when it noted that "(t)he fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution." (citation omitted) Such is the clearly case here, obviating most of the Petitioner's argument offered in pages 10 through 13 of his motion.

The Petitioner argues on page 9 that "the legislature has *complete control* over sentencing, including judicial discretion in sentencing," and cites *Fisher v. State*, 690 So.2d 268, 275 (Miss. 1996) as authority therefor. That is somewhat misleading and badly out of context as to the case *sub judice* in that *Fisher* dealt with a claim by the appellant that the capital rape statute was unconstitutional because its mandatory sentencing provisions took away the discretion of the judge to sentence to something other than life imprisonment. The court basically laughed that off and noted that setting sentencing ranges is the legislature's prerogative, including withholding any

discretion from the judges in some cases. *Fisher* did not address the discretion of judges in cases in which sentences had already been entered and is thus clearly distinguishable (and inapplicable).

The Petitioner argues beginning on page 9 that the legislature merely amended the authorized penalties for violations of post-release supervision and that the power to define sentences and penalties in criminal cases is a legislative function rather than a judicial one. While we agree that establishing penalties for crimes is wholly a legislative function, we cannot concede that determining the manner of enforcement of a sentencing order already entered falls within that realm. Further, we agree that the legislature has the power to modify penalties for a criminal violation even after indictment and that our Supreme Court has decided that criminal defendants are entitled to the benefit of the lesser of the penalties after such modification enacted ***before sentencing.*** Once again, however, the Petitioner is arguing irrelevant issues since Atwood was sentenced before any amendment of the statute under which he was sentenced, Section 97-17-41, a sentence that he did not appeal.

Petitioner states on page 10 that "(t)here is no reason to believe that the Legislature's power to modify the authorized penalties for violations of post-release supervision is any different from, or lesser than, its power to modify the penalties for crimes." There is, however, at least one: **Violations of post-release supervision are also violations of a court's order(s).** As noted elsewhere herein, that makes such violations judicial issues, not legislative ones. It is for the legislature to set sentences and for trial judges to exercise their discretion to impose within the permissible range. *Bolton v. State*, 752 So.2d 480 (Miss.App. 1999), at page 487, (citation omitted)

The State does not dispute the Petitioner's claim on page 10 that post-release supervision is a statutory creation; however, we fail to see the connection. Once a sentence has been reduced to an order of the circuit court, it is subject to the full constitutionally-appropriated power of that

court to enforce it (by whatever designation it may have, i.e. "post-release supervision," "probation," etc.).

IV. THE CIRCUIT COURT ACTED WITHIN ITS AUTHORITY

The Petitioner asserts that the circuit court lacks the authority to sentence him to any facility other than a technical violation center or a restitution center. Such a claim defies logic and ignores constitutional law and the particular facts of his criminal case. The defendant was sentenced on January 15, 2014, to a term of ten years in the custody of the Mississippi Department of Corrections. The actual service of all but thirty days of that sentence was conditionally suspended subject to the requirement that he abide by certain rules imposed by the court, clearly set forth in his order and agreed to by him and his lawyer. (see "ORDER ACCEPTING GUILTY PLEA AND IMPOSING SENTENCE" attached to the Petitioner's motion) The order of July 2, 2014, is not, in fact, a real sentencing order at all, but rather an order of revocation of the previous suspension of the original sentence – a sentence with the enforcement of which the legislature has no constitutional authority to intervene.

The point to be made here, then, is that some after-the-fact creation of the legislature such as a "technical violation center" was not part of the Petitioner's sentence at any time; therefore, such could not now be inserted as a modification of the actual sentence except in the discretion of the circuit court, which discretion the court chose not to exercise. Too, the Petitioner has failed to show any valid reason why a return to a restitution center, which actually ***was*** a part of his original sentence, would be an appropriate placement under the circumstances. After all, he chose to do what it took to get kicked out of one.

It should be noted that **the revocation order of July 2 does not tell the Mississippi Department of Corrections where, specifically, to place the Petitioner**, as implied by the

Petitioner's motion. All the court did was make a finding that neither a technical violation center nor a restitution center would be appropriate, even though such a placement might be available; therefore, the court was not going to place the Petitioner in one of those. The order only reiterated the term of incarceration originally ordered and placed the Petitioner in MDOC's custody for that period of time. Frankly, although it would evince a somewhat disrespectful attitude on the part of MDOC to do so, one supposes the department technically could place the Petitioner in one of those less-restrictive facilities – so long as it was for whatever portion of the nine years and eleven months the law requires (which, purely as an aside, seems not to have been a strict guideline for MDOC over the last couple of decades, anyway).

Although the Petitioner advances the potential societal and sociological benefits of such placements, the logic and legal conclusions set forth in *Alexander*, cited earlier, would still prevail.

V. THE CONSTITUTION SUPPORTS THE ACTION OF THIS COURT

The entire gist of the Petitioner's argument in challenging the revocation order in Petitioner's criminal case is that the Court erred in its determination that (1) the Petitioner's post-release supervision should be revoked, (2) the Court had the legal authority to revoke him, (3) House Bill 585's provisions mandating a limitation of the Court's options are unconstitutional, and (4) technical violation centers and restitution centers would be inappropriate placements under the circumstances.

To be perfectly clear about the State's position, the State submits that the Court's actions were entirely appropriate and legally and constitutionally sound.

Some deeper insight into the resolution of the constitutional issues arising from this case is provided by our appellate courts. For example, in *Newell v. State*, 308 So.2d 71 (Miss. 1975), our Supreme Court addressed the question of whether or not trial judges were bound by a statute

that provided that they could only instruct a jury on applicable law on request of one of the parties. The court expressed its willingness to comply with statutes suggesting procedural rules so long as they are not "an impediment to justice or an impingement upon the constitution. The inherent power of this Court to promulgate procedural rules emanates from the fundamental constitutional concept of separation of powers and the vesting of judicial powers in the courts." at page 76 (citations omitted)

The court, citing *Southern Pacific Lbr. Co. v. Reynolds*, 206 So.2d 334, 335 (Miss. 1968), went on to note that "(t)he phrase 'judicial power' in section 144 of the Constitution includes the power to make rules of practice and procedure, not inconsistent with the Constitution, ***for the efficient disposition of judicial business***." (emphasis added)

Further, still at page 76, the court, *sua sponte*, then shared the rationale for not allowing the legislature to dictate court procedures, as follows:

> All courts recognize the benefit of stability through the law, but acknowledge that it should be permitted growth without stagnation ***when justice requires***, hopefully without grievous error. The procedural changes needed to meet the needs of a particular era and to maintain the judiciary's constitutional purpose would be better served, we believe, if promulgated by those conversant with the law through years of legal study, observation and actual trials in accord with their oaths rather than by well-intentioned, but over-burdened, legislators of other pursuits and professions." (emphasis added)

Then, at page 77, addressing the constitutional mandate in Article 1, Section 2, that "(n)o person or collection of persons, being one or belonging to one of these departments, shall exercise any power properly belonging to either of the others...," the court reasoned as follows:

> Without additional words it would seem there is no more reason to support legislative control of court procedures than there would be to uphold court supervision of the procedures by which the legislative and executive departments discharge their constitutional duties. However, the constitutional directives do not rest with the pronouncement of these general principles. The division of authority is specifically implemented by Section 144 of the Constitution:

> The judicial power of the state shall be vested in a Supreme Court and such other courts as are provided for in this constitution.

This leaves no room for a division of authority between the judiciary and the legislature as to the power to promulgate rules necessary to accomplish the judiciary's constitutional purpose.

The court, at pages 77-78, then goes on to refer to Section 155 of the Constitution and the oath of judges to administer justice agreeably to the constitution and a court's duty thereunder, as follows:

> The above brings into focus the heart of the issue, and that is – what course the court shall follow in the event the laws enacted by the legislative department are not agreeable with the directives of the constitution. We believe no citation of authority is needed for the universally accepted principle that if there be a clash between the edicts of the constitution and the legislative enactment, the latter must yield.
>
> We conclude that Mississippi Code Annotated sections 11-7-155 and 99-17-35 (1972) contravene the constitutional mandate imposed upon the judiciary for the fair administration of justice since such administration is thwarted by the terms of a statute, "at the request of either party" which prohibits a judge from instructing a jury as to the applicable law of the case when he has the sworn duty to administer justice and uphold the law. We are of the opinion that the framers of our constitution never intended that a judge be so shackled by legislative statute that he become totally dependent upon the requests of litigants so that he might perform his constitutional duty.

The court then offered a proposed revision for one of the disputed statutes and then, again at page 78, concluded with its rationale for exercising its rule-making authority and for dealing with legislative encroachment, as follows:

> As the statute remains, we think it must be implemented for retrial of this case and for the future guidance of the bench and bar. This requires the Court to draw upon its inherent power to prescribe rules of procedure to facilitate the administration of justice in the courts throughout the state. In doing so, we hasten to say that as long as rules of judicial procedure enacted by the legislature coincide with fair and efficient administration of justice, the Court will consider them in a cooperative spirit to further the state's best interest, but when, as here, the decades have evidenced a constitutional impingement, impairing justice, it remains our duty to correct it.

(Of course, the Supreme Court resolved all questions of legislative encroachment in certain areas a decade or so later with the adoption of wide-sweeping rules governing various aspects of court procedures. Undoubtedly, the court could not have foreseen that the legislature would have attacked the inherent power of the courts to enforce their own orders, as has resulted in the present litigation.)

Similarly, in the case of *Jones v. City of Ridgeland*, 48 So.3d 530 (Miss. 2010), the court addressed the so-called "three-court rule" as set forth by statute regarding the appeals process for misdemeanor convictions and, at page 536, held as follows:

> The separation-of-powers doctrine outlined in Article 1, Sections 1 and 2, of our Constitution prescribes the limitations on the power of each branch of government. This doctrine ensures that the coequal branches do not encroach on the powers of the others. *Alexander v. State By and Through Allain*, 441 So.2d 1329, 1335-36 (Miss. 1983). Further, this Court has held that "(t)he rule is well settled that the judicial power cannot be taken away by legislative action. ***Nor may the Legislature regulate the judicial discretion or judgment that is vested in the courts. Any legislation that hampers judicial action or interferes with the judicial functions is unconstitutional."*** *City of Belmont v. Miss. State Tax 'Comm'n*, 860 So. 2d 289, 297 (Miss. 2003) (further citation omitted) (emphasis added)

Such pronouncement by the Court is, in and of itself, dispositive of the constitutional issues in the case *sub judice* because enforcing a sentence that is within statutory guidelines is clearly a judicial action, and the enactment of House Bill 585, to the extent that it attempts to regulate how this court enforces its orders, "hampers judicial action (and) interferes with the judicial functions." The discretion to enforce the suspended portion of Atwood's sentence – or not – is vested only in the court that ordered such suspension in the first place, not in the legislature.

"Legislative power may not be 'vested with an arbitrary and uncontrolled discretion.' " *D.J. Koenig & Assoc. v. Miss. State Tax*, 838 So.2d 246, 253 (Miss. 2003), citing *State v. Allstate Ins. Co.*, 231 Miss. 869, 882, 97 So.2d 372, 375 (Miss. 1957). "The fundamental question the Court considers when confronted with a separation of powers problem was stated in *Alexander*

(*supra*, at page 1345, in this response). Is the power being exercised by members of one branch *at the core* of the other's power?" *Moore v. Board of Sup'rs of Hinds County*, 658 So.2d 883 (Miss. 1995) "Furthermore, it is the role of the judiciary to determine when the executive and legislative branches have overstepped their boundaries." (citation omitted) *Limbert v. Miss. Univ. for Women*, 998 So.2d 993, 1001 (Miss. 2008) "(A) statute cannot trump the Mississippi Constitution." *Pickering v. Langston Law Firm, P.A.*, 88 So.3d 1269, 1288 (Miss. 2012).

The State submits that the enforcement of its own orders is squarely "at the core" of a court's judicial powers, and that it was a gross attempt at usurpation of those powers for the legislature to invade that province. Given the authorities cited hereinabove, the Court had both a right and, respectfully submitted, a duty to address the issue head-on and *sua sponte* in order to correct the legislature's arbitrary action in overstepping its constitutional limitations by enacting the subject portion of House Bill 585.

VI. A STATUTE ALSO SUPPORTS THE COURT'S ACTION

While bending over backward to praise the legislature for its "well-reasoned policy decision" and its "well-reasoned exercise of the recognized legislative power," the defendant somehow conveniently neglected to address the legislature's well-reasoned decision to ***not*** address in House Bill 585 or any other legislation the provisions of a controlling statute, as follows:

> **Section 99-19-29. Vacation of suspended sentence and annulment of conditional pardon for violation of terms.**
>
> Whenever any court granting a suspended sentence, or the governor granting a pardon, based on conditions which the offender has violated or failed to observe, shall be convinced by proper showing, of such violation of sentence or pardon, then the governor or the judge of the court granting such suspension of sentence shall be authorized to annul and vacate such suspended sentence or conditional pardon in vacation or court time. The convicted offender shall thereafter be subject to arrest and court sentence service, as if no suspended sentence or conditional pardon had been granted, and **shall be required to serve the full term of the original sentence that has not been served.** The offender shall be subject,

after such action by the court or the governor, to arrest and return to proper authorities as in the case with ordinary escaped prisoner. (emphasis added)

Without conducting an exhaustive search of the history of that statute, it appears to have been the law of this state since at least 1926, so it is easy to see how it could have been overlooked by the Petitioner.

Added significance of this statute is that it is not dependent upon post-release supervision for its relevance. In fact, it is an acknowledgement by the legislature that the courts should in fact be empowered to enforce their sentences when the conditions upon which they were suspended have been violated (not that such concurrence by the legislature was needed in the face of constitutional authority). Atwood's sentencing order specifically provides that "(i)t is the order of the Court that: You shall comply with the following conditions." (See Order Accepting Guilty Plea and Imposing Sentence attached to Petitioner's motion) The conditions, which are also conditions of his post-release supervision, are thereafter set out in writing. Obviously, as the Court found on July 2, the Petitioner did not comply with those conditions.

While enactments creating and modifying provisions for probation and post-release supervision – and court orders establishing the conditions thereof – give perhaps-needed guidance to the department of corrections and its field officers, there is no authority for the proposition that such enactments are binding on the courts in their constitutional duties of ordering and enforcing sentences.

The statute is both unambiguous and applicable to the case at bar, and it is even more persuasive given the overwhelming body of constitutional law supporting the Court's ruling at the time of the revocation of the Petitioner's post-release supervision.

VII. CONCLUSION

It seems clear from the authorities cited that the legislature exceeded any constitutional authority it possesses when it strayed from the confines of legislative matters and ventured into the domain of the courts by enacting provisions which sought to limit the power of the courts to enforce their own orders. "While we recognize that the legislature possesses the power to take away by statute what has been given by statute, the same cannot be said for that created by the Constitution. To allow this would be an affront to our Constitution." *Board of Trustees of State IHL v. Ray*, 809 So.2d 627, 637 (Miss. 2002) In other words, the legislature may not constitutionally exercise a power it lacks. Thus the Court, in rendering the order and making the findings of which complaint is made in the Petitioner's motion, was acting wholly within the sphere of its constitutional and statutory authority, and the relief sought by the Petitioner should be denied, and the Court should re-affirm its ruling as to the unconstitutionality of the legislature's action in attempting to limit the court's ability to enforce its own order.

RESPECTFULLY SUBMITTED this 19th day of November, 2014.

BILBO MITCHELL, DISTRICT ATTORNEY

BY: _____
PHILIP S. WEINBERG, ADA

Philip Scott Weinberg
Assistant District Attorney
10th Circuit Court District
Post Office Box 5172
Meridian, Mississippi 39302
601-482-9757 (office)
601-483-0085 (fax)
MSB # 7081